

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

REBECCA FRISBY

Plaintiff,

v.

JO ANNE B. BARNHART

Commissioner of Social Security

Defendant.

:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION NO. 05-CV-2177

MEMORANDUM AND ORDER

Tucker, J.

November 30, 2005

Presently before this Court are Plaintiff's Motion for Summary Judgment (Doc. 13) and Defendant's Cross Motion for Summary Judgment (Doc. 10). Plaintiff requests the Court to grant her Motion for Summary Judgment, reverse the findings of the Commissioner of Social Security ("Commissioner"), and remand the case to the Commissioner for her calculation of benefits from June 6, 1996 through November 21, 2001. Defendant requests that the Court affirm the Commissioner's decision that Plaintiff was not disabled prior to November 29, 2001 and not entitled to disability benefits prior to this date. Based on the record, the administrative law judge's ("ALJ") decision, and Defendant's brief, Defendant asks that the Court resolve summary judgment in Defendant's favor.

For the reasons set forth below, upon consideration of both Motions, this Court will grant Defendant's Motion, deny Plaintiff's Motion, and enter summary judgment in favor of Defendant.

BACKGROUND

Both Plaintiff and Defendant rely upon the Transcript of the proceedings before the ALJ. Thus the facts presented on both sides align with the facts of record, and the record reveals the following undisputed facts. Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) to review the decision of the Commissioner of Social Security denying her claim for disability insurance benefits (“DIB”) under title II of the Social Security Act (“Act”), 42 U.S.C. §§ 401-433.

Plaintiff states that she was nearly 50 years old on the date she alleges her disability began. She lives with her husband, uses a cane prescribed by her primary care physician, Dr. John Aaron, when walking outside her home, graduated from high school, and worked as a Certified Nurse Assistant for eighteen (18) years until June 1996. On April 15, 1997, Plaintiff protectively filed an application for DIB, alleging disability as of June 6, 1996. Her application was denied by the state agency initially and upon reconsideration. A hearing was held before an ALJ on July 7, 1998. On August 31, 1998, the ALJ vacated the reconsideration determination and remanded Plaintiff’s claim for evaluation of a possible mental disorder. Upon reconsideration, the state agency denied Plaintiff’s application again and determined that she was not disabled by either a physical or mental impairment.

Following a December 22, 1999 supplemental hearing with vocational expert testimony held before the ALJ, the ALJ issued a decision on March 9, 2000 finding Plaintiff not disabled. On February 20, 2002, the Appeals Council remanded Plaintiff’s claim to the ALJ to evaluate further the medical evidence. A third hearing was held on June 10, 2002, where testimony was taken from an independent medical expert.

On June 20, 2002, the ALJ issued a partially favorable decision finding Plaintiff disabled

as of November 29, 2001, when she became 55 years of age, but not prior. The Appeals Council denied Plaintiff's request for review of the decision on March 21, 2005, making the ALJ's partially favorable decision the final decision of the Commissioner.

Plaintiff has exhausted her administrative remedies, and the issues now before the Court on summary judgment are (1) whether the Commissioner's final decision finding that Plaintiff was not under a disability prior to November 29, 2001 is supported by substantial evidence, (2) whether the Commissioner followed the proper procedures and correctly applied the law, and (3) whether the Commissioner denied the Plaintiff a full and fair hearing on Plaintiff's claim.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the

district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against opponent, even if the quality of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

Additionally, a district court's review of the Commissioner's denial of a claim for DIB under title II of the Act is limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner's findings of fact. 42 U.S.C. §§ 405(g); Knepp v. Apfel, 204 F.3d 78, 83 (3d Cir. 2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). The Court is not empowered to re-weigh the evidence of record or substitute its conclusions for those of the fact-finder. Williams v. Sullivan, 970 F.2d 1187, 1182 (3d Cir. 1992). If the Commissioner's decision is supported by substantial evidence, it cannot be set aside, even if the Court would have

decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999).

DISCUSSION

Plaintiff argues that although she has the burden of proving her disability, the Commissioner has the duty to insure that her actions are fair and thorough. Accordingly, the Commissioner is directed to apply a five step sequential evaluation of disability, considering the claimant's (1) current work activity, (2) the severity of the impairments, (3) whether the impairments meet or equal the listed impairments, (4) the ability to perform past work, and (5) the residual functional capacity to do other work in the national economy. 20 C.F.R. §§ 404.1520, 416.920. Plaintiff asserts that the Commissioner did not satisfy her duty of fairness and thoroughness when she denied Plaintiff's DIB claim.

Where a listed impairment is not met or equaled, the four elements of proof the Commissioner must consider in determining whether the Plaintiff is disabled under the Act are (1) the objective medical facts, (2) the diagnoses and expert medical opinions of the treating and examining physicians, (3) the subjective evidence of pain and disability testified to by the claimant, and (4) the claimant's age, educational background, and work history. See Brittingham v. Weinberger, 408 F. Supp. 606, 612 (E.D. Pa. 1976). If a definitive decision can be reached at any point in the sequential evaluation process, further evaluation is not necessary. 20 C.F.R. §§ 404.1520(a). Once the Plaintiff has made a prima facie showing that she is unable to return to her previous work, or if there is no past relevant work, the burden shifts to the Commissioner to demonstrate that the Plaintiff is able to perform specific jobs existing in the economy. Rossi v. Califano, 602 F.2d 55, 58 (3d Cir. 1979). If there is no finding as to availability of alternative

employment, a denial of disability benefits can only be sustained if there is substantial medical evidence in the record that Plaintiff's impairment did not prevent her from engaging in her former occupation. Id.

A. ALJ's Finding That Plaintiff Was Not Presumptively Disabled

Plaintiff says that the ALJ erred in finding that her severe musculoskeletal impairment does not meet or equal the criteria of any of the impairments listed in 20 C.F.R., Part 404, Subpart P, Appendix 1, Listing 1.04,¹ when she suffers from multiple herniated discs, degenerative disc disease with osteophytes in the lumbar spine, radiculopathy, diminished range of motion, muscle weakness, impaired sensation and reflex loss, and positive straight leg raising test. (Pl.'s Mot.

¹Listing 1.04 provides:

Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including cauda equina) or the spinal cord.
With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);

or

B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours;

or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

20 C.F.R., pt. 404, subpt. P, app. 1.

Summ. J. 7-8.) According to Plaintiff, the evidence of her disability is in the record, and there is no substantial evidence to the contrary. Furthermore, when the medical evidence shows that a claimant has an impairment, which meets or is equal to a listed impairment, she should be found “disabled” without considering her age, education, and work experience, and the ALJ has the duty to fully and fairly examine the evidence to determine whether any applicable listing has been met or equaled. (Pl.’s Mot. 8.)

The Defendant states that Plaintiff’s musculoskeletal impairment did not meet or equal the listings which describe impairments considered severe enough under the C.F.R. to prevent a person from engaging in any gainful activity.² While Plaintiff may have intermittently met some of the clinical findings required for a determination that her musculoskeletal impairment met or equaled the listing, the evidence was not sufficient for her to be found presumptively disabled. (Def.’s Mot. Summ. J. 14.)

The record of Plaintiff’s medical history was devoid of any abnormal physical findings through November 29, 2001, the date she was found disabled and from which she was awarded DIB. Furthermore, no physician ever stated that Plaintiff’s impairment met or equaled the listed impairment. An independent medical expert, Dr. Stanley Askin, and state agency medical consultant, Dr. Donald Reid, opined that Plaintiff’s musculoskeletal impairments were not per se disabling. (Def.’s Mot. 16.)

There were also other medical opinions, including those of Dr. Gene Salkind, a neurosurgeon who evaluated Plaintiff and concluded that her condition was due to a lumbar

²See Sullivan v. Zebley, 493 U.S. 521, 532 (1990) (indicating that the listings can operate as a presumption of disability without further inquiry as to whether the claimant can actually perform her own prior work or other work).

sprain; Dr. Noubar A. Didizian, a Board-certified orthopedic neurologist who opined (though did not actually examine Plaintiff) that Plaintiff was fully recovered from her work injury; Dr. Aaron, Plaintiff's primary care physician who believed that Plaintiff could do limited, light-duty sedentary work; Dr. Mark Lopatin, a rheumatologist who evaluated Plaintiff, completed a functional capacity assessment and found no limitation in Plaintiff's ability to use her hands and feet for repetitive movements; Dr. William Mangino, II, a Board-certified anesthesiologist who evaluated Plaintiff at the request of Plaintiff's worker's compensation attorney and concluded that Plaintiff could do some lifting up to ten (10) to fifteen (15) pounds; and Dr. Elliot Brownstein, a Board-certified internist who performed a consultative examination of Plaintiff, and stated that Plaintiff's symptoms were out of proportion to her physical examination, but concluded that Plaintiff could lift up to ten (10) pounds, and walk and stand in a prolonged fashion without any limitation (Def.'s Mot. 4-8), all of which suggested that Plaintiff could still perform gainful activity notwithstanding her impairments. (Def.'s Mot. 14-16.)

Thus, substantial evidence supported the ALJ's finding that Plaintiff did not have an impairment that met or equaled the criteria listing under the C.F.R.

B. Proper Evaluation of Treating Physician's Opinions

Plaintiff states further that the ALJ erroneously rejected the findings and opinions of Plaintiff's treating physicians, and instead made medical judgments that are contrary to the medical evidence submitted by treating physicians. (Pl.'s Mot. 8.) A treating physician's opinion cannot be rejected unless the ALJ points to other contradictory medical evidence of record, and it is an error of law to reject the treating physicians' opinions without adequate explanation. See

Rocco v. Heckler, 826 F.2d 1348 (3d Cir. 1987); Wallace v. Sec’y of Health & Human Svcs., 772 F.2d 1150 (3d Cir. 1983).

Dr. Aaron, the long-time treating physician, gave a deposition in connection with Plaintiff’s worker’s compensation case. Based on objective tests and clinical findings, Dr. Aaron concluded that Plaintiff has herniations in the neck and low back, causing radicular pain in the arms and legs. In his opinion, she could not return to work as a nurse assistant, would not be clear-headed and would have problems with drowsiness and concentration because she was on “heavy narcotic medications,” and would be limited to essentially sedentary work where she could alternate sitting and standing. (Pl.’s Mot. 9.)

Plaintiff emphasizes her referrals to Dr. Lopatin, a rheumatologist, and Dr. Mangino who is board certified in pain management, who both found that she was severely limited in her ability to perform any physical activity and even most light duty work that did not allow her to take frequent sitting breaks. (Pl.’s Mot. 10.)

Defendant argues that Plaintiff’s treating physician’s opinions were properly evaluated given that it is the ALJ’s responsibility as the fact finder to decide what weight to give various medical opinions. In this case, the ALJ’s findings were consistent with the opinion of Plaintiff’s doctor, Dr. Aaron, that Plaintiff could not return to her past heavy work as a nurse’s assistant.

Furthermore, the ALJ’s finding that Plaintiff could perform light duty work was consistent with Dr. Aaron’s opinion that Plaintiff should not lift more than fifteen (15) pounds and that she could not do any prolonged sitting or standing. The ALJ did not err in evaluating the medical opinions of Drs. Lopatin or Mangino, neither of whom were treating physicians. Finally, the ALJ as finder of fact did not err in her consideration of Dr. Askin’s testimony because medical

opinions from non-examining physicians such as medical experts and state agency medical consultants can support an ALJ's decision that a claimant is not disabled, without rising to the level of error, predetermination, or bias as the Plaintiff suggests.³

C. Proper Consideration of Claimant's Testimony

In addition, Plaintiff states that the ALJ did not properly evaluate Plaintiff's residual function capacity and, in that regard, failed to properly assess the credibility of the claimant's testimony. Plaintiff argues that the ALJ found that the claimant's description of her symptoms and the degree to which the symptoms limit her function to be credible only to the extent that it was consistent with the ALJ's own conclusion. (Pl.'s Mot. 13.)

Plaintiff asserts that before the ALJ may reject the Plaintiff's testimony as to her symptoms, there must be medical evidence to disprove it. Matullo v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990); Chrupcala v. Heckler, 829 F.2d 1269 (3d Cir. 1987). The findings of Plaintiff's treating physician are consistent with her testimony, and Plaintiff argues in her Motion that there is no substantial, contradictory medical evidence. When a Plaintiff has a condition that would reasonably be expected to cause the reported symptoms, her subjective complaints are entitled to great weight. Schaudeck v. Comm'r of Soc. Sec., 181 F.3d 429, 435 (3d Cir. 1999).

Plaintiff has argued that the ALJ's observation that Dr. Aaron's testimony is not consistent with the claimant's testimony "that Dr. Aaron told her not to do any work because of her medications" is not supported by the record, which reflects Dr. Aaron's testimony that, in his opinion, Plaintiff could not return to work as a nurse assistant, and was on heavy narcotic

³See Richardson v. Perales, 402 U.S. 389, 408 (1971) (recognizing that a medical expert may be necessary to explain medical problems in lay terms).

medications that cause drowsiness, confusion, and poor concentration. (Pl.'s Mot. 14.) Further, the vocational expert testified that certain side effects of Plaintiff's medication were work-preclusive.

As such, Plaintiff believes that the ALJ failed to consider the effects of all of her impairments in combination, failed to consider the side effects of Plaintiff's medications, and failed to give serious consideration to Plaintiff's subjective complaints about pain in assessing her residual functional capacity.

Defendant states that while the ALJ must seriously consider a claimant's subjective complaints of pain, an ALJ is not required to accept a claimant's testimony uncritically, may weigh such complaints against the medical evidence, and may reject them. See Hartranft v. Apfel, 181 F.3d 358, 362 (3d Cir. 1999). For example, the record was devoid of any evidence that Plaintiff complained about drowsiness or lack of concentration resulting from her medication to her treating physician. (Def.'s Mot. 21.) In addition, the ALJ's review of Plaintiff's medical records revealed that Plaintiff's impairments were not as severe as she alleged. While the ALJ recognized that Plaintiff had some pain and limitation due to her impairments, the ALJ applied the correct standard when she concluded upon review of Plaintiff's medical records that Plaintiff's pain was not to such an extent that she was precluded from all work activity.

D. Application of Grid Rules

Plaintiff argues that the ALJ erroneously determined that the claimant was "not disabled" through November 28, 2001 based solely on vocational grid rules. Where an individual has an impairment or combination of impairments resulting in both strength limitations and non-

exertional limitations, the vocational rules are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone, and the ALJ must give full consideration to all the relevant facts in the case.⁴ Plaintiff believes that under the facts of this case, particularly in light of the vocational expert's testimony, the ALJ's denial of Plaintiff's benefits prior to her 55th birthday was inappropriate. (Pl.'s Mot. 18.)

Contrary to Plaintiff's assertion, the ALJ did not rely solely on grid rules to find Plaintiff not disabled prior to November 29, 2001, but rather relied on the grid rules only as a framework for making a decision. Specifically, the ALJ indicated in the findings and at the end of her decision that she relied upon both vocational testimony and the grid rules for her decision. (Def.'s Mot. 23.) As such, the Court agrees with Defendant that Plaintiff's contention is without merit.

E. Vocational Expert Testimony

Plaintiff argues that the Commissioner has not sustained her burden to prove that prior to November 29, 2001, Plaintiff had the ability to perform work that exists in significant numbers in the national or local economy. In arguing that the substantial evidence does not support the ALJ's conclusion that Plaintiff had the residual functional capacity to perform a range of unskilled light work, Plaintiff asserts that the ALJ's hypothetical questions to the vocational expert did not accurately portray Plaintiff's individual physical and mental impairments. Thus the vocational expert's testimony as to the existence of work in the national or local economy for the hypothetical claimant posed by the ALJ should not have formed a basis for the ALJ's conclusion

⁴See 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e)(2). Social Security may consider a person disabled, who is aged fifty (50) through fifty-four (54) and has a severe impairment and limited education or work experience that may seriously affect her ability to adjust to other skilled work. 20 C.F.R. pt. 404, subpt. P, app. 2, § 201.14.

that Plaintiff herself had the ability to perform the jobs available in the national or local economy upon which the ALJ based her conclusion.⁵ (Pl.'s Mot. 19-22.)

Defendant claims that Plaintiff could perform a significant number of jobs prior to November 29, 2001, when she turned fifty-five (55), based upon both grid rules and the testimony of the vocational expert. (Def.'s Mot. 24.) Defendant asserts, and the Court is persuaded, that the ALJ's hypothetical questions to the vocational examiner accurately portrayed Plaintiff's credibly established physical and mental limitations.⁶ Contrary to Plaintiff's assertion, the light duty jobs of interviewer, checkroom attendant, inventory clerk, and sales counter clerk that the vocational expert identified were not inconsistent with Plaintiff's residual functional capacity as determined by the ALJ.

F. Full and Fair Hearing

Finally, Plaintiff also believes that the ALJ denied her a full and fair hearing on her claim because after the Appeals Council granted Plaintiff's request for Review and remanded the case to the ALJ to conduct an adequate evaluation of the medical evidence, the ALJ neither properly accounted for certain of Plaintiff's vocational limitations, nor sought clarification from the vocational expert as to impact of those limitations on Plaintiff's ability to work. Plaintiff further asserts that the ALJ improperly relied greatly on Dr. Askin's "evasive, irrelevant, and immaterial"

⁵Vocational experts may offer views to the ALJ concerning the existence of specific jobs for which a claimant would qualify, given her impairment, and the transferability of skills from a claimant's previous job to a future job. For a vocational expert's opinion to be relevant or helpful, it must be in response to a proper hypothetical question that accurately portrays a claimant's credibly established physical and mental limitations. See Rutherford v. Barnhart, 300 F.3d 546, 554 (3d Cir. 2005); Podeworny v. Harris, 745 F.2d 210, 218 (3d Cir. 1984).

⁶The vocational expert identified several light occupations that a hypothetical individual, like Plaintiff, could perform consistent with the residual functional capacity found by the ALJ, based on all the relevant facts of this case.

testimony, and that the ALJ's comments⁷ upon remand "present, at the very least, an appearance of partiality and predetermination and a threat to the claimant." (Pl.'s Mot. 24.)

In response, Defendant argues that Plaintiff was not deprived of a full and fair hearing. To begin, Plaintiff did not raise this issue before the ALJ or the Appeals Council. (Def.'s Mot. 26.) Furthermore, the ALJ properly followed the instructions of the Appeals Council's remand order by further considering the report of Dr. Mangino and obtaining testimony from a medical expert. The Appeals Council did not require the ALJ to obtain supplemental evidence from a vocational expert, and Plaintiff's counsel did not request such testimony. (Def.'s Mot. 26-27.)

The Court finds that neither the fact that Plaintiff disagrees with Dr. Askin's independent medical opinion, nor that the ALJ ultimately did not agree with Plaintiff's position and relied instead on Dr. Askin's testimony are evidence that the ALJ was biased or that Plaintiff was denied a full and fair hearing.⁸

CONCLUSION

Plaintiff raises six (6) arguments that the ALJ's determination was erroneous. However, this Court finds that there is no legal error in the ALJ's decision and that there is substantial evidence in the record to support the conclusions of the ALJ. The record reveals, as set forth above, that the Commissioner applied the correct legal standards and that the record as a whole

⁷The ALJ informed Ms. Frisby that "knowing what Dr. Askin was going to say, . . . hearing what Dr. Askin had to say . . . Ms. Frisby is entitled to a Favorable Decision under the grids as of age 55 . . . [or] obviously it would be a Partially Favorable and obviously [the ALJ was] . . . not going to even promise [Ms. Frisby] that. [The ALJ] can turn that on a dime." (Tr. 229-30.) According to the Plaintiff, the ALJ's approach to the case gave the impression that she made a predetermination that foreclosed Plaintiff's access to a full and fair hearing. While, the ALJ's comments may not have been prudent or warranted, the fact remains that there is substantial factual evidence of record to support the ALJ's determination of Ms. Frisby's claim as fair, and on the merits.

⁸Plaintiff had three hearings, testimony from two vocational experts, testimony from a medical expert, and the opportunity to present pages of medical records to the ALJ.

contains substantial evidence to support the ALJ's findings of fact and conclusions of law. For the foregoing reasons, this Court will enter Summary Judgment in favor of Defendant, Commissioner of Social Security. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

	:	
REBECCA FRISBY	:	CIVIL ACTION NO. 05-CV-2177
Plaintiff,	:	
	:	
v.	:	
	:	
JO ANNE B. BARNHART	:	
Commissioner of Social Security	:	
Defendant.	:	
	:	

ORDER

AND NOW, this ____ day of November, 2005, upon consideration of Plaintiff's Motion for Summary Judgment (Doc. 13) and Defendant's Cross-Motion for Summary Judgment (Doc. 10), **IT IS HEREBY ORDERED AND DECREED** that:

1. The Motion for Summary Judgment filed by Plaintiff is **DENIED**;
2. The Motion for Summary Judgment filed by the Defendant is **GRANTED**;

and

3. **JUDGMENT IS ENTERED** in favor of Defendant and against Plaintiff.

IT IS FURTHER ORDERED that the Clerk of the Court shall mark the above-captioned case as **CLOSED**.

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.